UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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PHYLLIS DAMANTE,

Plaintiff,

COMPLAINT

-against-

Civil Case No. 10-cv-02461

CITY OF NEW YORK, AND
NEW YORK CITY DEPARTMENT OF
EDUCATION, JOE ANN CHESTER,
INDIVIDUALLY, AND MIKE KOZLOWSKI,
INDIVIDUALLY,

Jury Trial Demanded

Defendants.
---X

Plaintiff, PHYLLIS DAMANTE, ("Plaintiff" or "Ms. Damante") by and through her attorneys, The Law Office of BORRELLI & ASSOCIATES, P.L.L.C., alleges, upon knowledge as to herself and her own actions and upon information and belief as to all other matters, as follows:

JURISDICTION AND VENUE

1. This is a civil action based upon the Defendants' violations of: (i) the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA"); (ii) the New York Executive Law § 290, *et seq*. under the New York State Human Rights Law ("NYSHRL"); (iii) the New York City Human Rights Law § 8-107 *et seq*. ("NYCHRL"); and (iv) any other cause(s) of action that can be inferred from the facts set forth herein.

2. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1331 and 28 U.S.C. 1343. The supplemental jurisdiction of the Court (28 U.S.C. §1367) is invoked over all state and local law causes of action.
3. Venue is appropriate in this court as all actions comprising the claims for relief occurred within this judicial district and pursuant to 28 U.S.C. § 1391 because one (1) or more of the defendants resides within this judicial district.
4. Plaintiff has also exhausted her administrative remedies by filing an Equal Employment Opportunity Commission ("EEOC") charge on or about February 26, 2007, under EEOC Charge No. 520-2007-01885.
5. The EEOC completed an investigation into Plaintiff's allegations set forth in her charge.
6. The EEOC found that "probable cause" existed to substantiate Plaintiff's allegations of discrimination.
7. Plaintiff received her Right to Sue Letter from the EEOC on January 20, 2010. Thus, this Complaint has been timely filed.

PARTIES

8. At all relevant times herein, Plaintiff Ms. Damante, was and is a resident of the County of Kings, State of New York.
9. At all times hereinafter mentioned, Defendant New York City ("City") was and still is a municipality duly organized and existing under the laws of the State of New York.
10. At all times hereinafter mentioned, Defendant the New York City Department of Education ("DOE") was and still is an agent or entity of Defendant City.

11. At all times relevant hereto, Defendant Jo Ann Chester ("Chester"), was and still is employed by Defendant DOE as the Principal at Fort Hamilton High School, a school located in the County of Kings, State of New York.

12. At all time relevant hereto, Defendant Mike Kozlowski ("Kozlowski"), was and is employed by Defendant DOE, and works at Fort Hamilton High School in the position of AP/Security, Supervisor of School Aides.

BACKGROUND FACTS

13. While acting under color of law and by way of authority and power granted to them by the State of New York, the Defendants, their agents, officers, servants and / or employees, engaged in unlawful conduct by discriminating and retaliating against Plaintiff based on Plaintiff's disability, in blatant violation of the ADA and all applicable state and local laws, by: (a) removing Plaintiff, without justification, from the position where she had worked for eight (8) years, which was a position capable of accommodating Plaintiff's disability; (b) failing to reasonably accommodate Plaintiff by moving her to one (1) of the at least twelve (12) existing positions that would have accommodated Plaintiff's disability, even after Plaintiff provided the Defendants with medical documentation indicating that Plaintiff's new position was hazardous to her health and life; (c) retaliating against Plaintiff for Plaintiff exercising her rights under the ADA and state and local laws by opposing Defendants' acts of illegal discrimination; and (d) terminating Plaintiff as being "unfit for duty" after she requested that a reasonable accommodation be provided to her.

14. Defendants City and DOE are employers within the meaning of the ADA.

15. Defendants City and the DOE employ 15 or more employees.

16. Plaintiff is a 59 year old female.

17. Plaintiff commenced her employment at DOE on or about March 5, 1998.

18. Plaintiff was assigned to work at Fort Hamilton High School ("Fort Hamilton"), in the position of "school aide."

19. Plaintiff's working hours at the school were from 7:00 a.m. to 11:00 a.m. on each school day.

20. There were and are numerous school aides employed at Fort Hamilton, each with differing, but similar responsibilities.

21. At the position to which Plaintiff was assigned, Plaintiff worked in the Social Studies office, and was responsible for assigning substitute teachers, ordering supplies, and providing assistance and support to teachers, administrators and students.

22. In or around 1998, Plaintiff was diagnosed with Sarcoidosis, a life-threatening lung disease that substantially inhibits Plaintiff's ability to breathe.

23. As a result of that disease, beginning in or around 2001, in order to breathe, Plaintiff has used oxygen at home and at work through a small portable tank with tubes that stretch from the tank to her nose that she is forced to carry around.

24. Additionally, as a result of her disease, since 2001, Plaintiff was and is on the lung transplant waiting list at Mt. Sinai Hospital.

25. Despite her severe health problems, Plaintiff's work evaluations and performance reviews have always been at minimum satisfactory, and typically well above average. In fact, on several occasions, the principal of Fort Hamilton, Defendant Chester, complimented Plaintiff for doing work well beyond the scope of her duties. On another occasion, on or about October 7, 2002, Plaintiff's direct supervisor, Gregory Abood

("Abood"), wrote a letter to "formally recognize [Plaintiff's] contributions to the Social Studies Department at Fort Hamilton High School." According to Abood's letter, a copy of which was provided to Defendant Chester, Plaintiff had "shattered the standard image of Paraprofessionals by enthusiastically and aggressively accepting various responsibilities." Moreover, Abood continued, Plaintiff's "intuitive skills . . . ha[ve] been invaluable" to Abood.

26. From the time Plaintiff commenced employment at Fort Hamilton, up until on or around September 2006, Plaintiff worked in the social studies office. That office accommodated Plaintiff's disability, as it contained a climate controllable by both heat and air conditioning, an absolute necessity in order for Plaintiff to comfortably breathe.

27. In or around September 2006, Plaintiff took a personal leave of absence from her position at Fort Hamilton.

28. Beginning at the time when Plaintiff returned from her leave of absence, on or around January 2, 2007, Defendants engaged in a continual pattern of discrimination against Plaintiff based on Plaintiff's disability. Defendants' actions were also taken against Plaintiff in retaliation for Plaintiff having opposed Defendants' acts of illegal discrimination. The actions taken by Defendants against Plaintiff include but are not limited to the events detailed in the following paragraphs.

29. On or about January 2, 2007, upon Plaintiff's return to work from her leave of absence, Abood informed Plaintiff that Defendant Kozlowski wanted to move Plaintiff from her position in the Social Studies office to a different position, in which Plaintiff would be required to monitor an entrance door to the school, as well as monitor a bathroom. Kozlowski then informed Plaintiff that he wanted Plaintiff to work a split-

shift, working two (2) hours per day monitoring the entrance door, and the remaining two (2) hours per day monitoring the bathroom, while sometimes actually working inside of the bathroom.

30. This new position would require Plaintiff to leave the air conditioned/heated Social Studies office, and instead work in the corridor right next to the entrance door as well as inside the bathroom, neither of which were either air conditioned or heated. As such, Plaintiff knew that accepting this position would result in Plaintiff experiencing great difficulty in attempting to breathe and by offering it to her, Kozlowski exhibited a willful indifference to Plaintiff's condition.

31. Upon information and belief, the aforementioned position to which Kozlowski wanted to move Plaintiff, the one requiring Plaintiff to monitor the entrance door and the bathroom, was seen as a very junior aide position. Accordingly, the typical practice at Fort Hamilton would have been to assign a more junior aide than Plaintiff, of which there were many, to this position, and to assign a more senior aide, such as Plaintiff, to an office position, such as Plaintiff's previous position in the Social Studies office.

32. Upon being informed by Kozlowski of the move to this new position, Plaintiff replied that because of her disability, working at either the entrance door or the bathroom would adversely affect her health. Kozlowski replied that Plaintiff's "medical excuses" were irrelevant and that she had no choice.

33. Plaintiff valued her job, and being an exemplary employee, Plaintiff determined that she would comply with Kozlowski's orders, and accept the switch in positions.

34. Plaintiff began work at her new position, and managed to work in that capacity for three (3) days before her lungs became severely infected with a life threatening strain of pneumonia, forcing Plaintiff to take sick leave and miss the next four (4) days of work.

35. Plaintiff, while on sick leave, then went to her doctor, Dr. Eugene Gibilaro ("Dr. Gibilaro"), who told Plaintiff that her disability would not permit Plaintiff to work in either location – at the entrance door or in the bathroom.

36. Dr. Gibilaro wrote a note, on his letterhead, explaining that Plaintiff's disability does not permit her to work in an environment that was not air conditioned or heated; specifically stating that Plaintiff could not work by the entrance door or by the bathroom. Dr. Gibilaro further requested a reasonable accommodation for Plaintiff, and stated that if given that reasonable accommodation, Plaintiff would certainly be able to complete the essential functions of her job.

37. After being examined by Dr. Gibilaro and receiving his diagnosis, Plaintiff next went to Dr. Maria Padilla, Plaintiff's Sarcoidosis and lung transplant doctor, to seek confirmation of Dr. Gibilaro's opinion. Dr. Padilla concurred with Dr. Gibilaro's opinion in its entirety, meaning that Dr. Padilla also agreed that working by the entrance door or bathroom would be a significant risk to Plaintiff's health, and that if given a reasonable accommodation, Plaintiff would be able to complete the essential functions of her job.

38. On or about January 11, 2007, Plaintiff returned to work, and Kozlowski again ordered Plaintiff to work by the entrance door and the bathroom. Plaintiff again replied to Kozlowski that her disability would not allow for this, and furnished Kozlowski with Dr. Gibilaro's note. Kozlowski read the note, and instructed Plaintiff to temporarily

return to the Social Studies office while he discussed the matter with Chester. Kozlowski told Plaintiff that he would "get back to [her]."

39. Later that same day, in keeping with his promise to "get back to [her]," Kozlowski despicably told Plaintiff that regardless of Plaintiff's disability, and regardless of the information contained in Dr. Gibilaro's note, that Kozlowski and Chester had determined that Plaintiff would work at the bathroom for the entirety of her four (4) hour shift. Plaintiff again responded that her disability would not allow for that, with Kozlowski then replying that Plaintiff had to work at the bathroom, that Plaintiff could "take it to the union if she had a problem," and that Plaintiff was "lucky that he did not change [Plaintiff's] hours" as a result of the "problems" that Plaintiff was causing.

40. The very next day, on or about January 12, 2007, Plaintiff called Chester to set up an appointment to meet with her.

41. The next day, on or about January 13, 2007, Plaintiff received an appointment to meet with Chester at 9:00 a.m. on January 16, 2007.

42. On or about January 16, 2007, Plaintiff met with Chester. When Plaintiff arrived at the meeting, Chester was holding a copy of Dr. Gibilaro's note that Plaintiff had provided to Kozlowski. Plaintiff told Chester about Kozlowski's statement to Plaintiff that both Kozlowski and Chester had met, and that they had both decided that Plaintiff should work by the bathroom. Chester initially denied that this occurred, but then backtracked and informed Plaintiff that Fort Hamilton is a "big school," and that "people have to work where needed." Chester further stated to Plaintiff that "anybody can get a doctor's note."

43. Plaintiff responded by again stating that her disability would not permit her to work in that environment, by requesting a reasonable accommodation, and by asking Chester what she should do. Chester responded by sending Plaintiff home, and told Plaintiff to call Chester by the end of week for further instructions.

44. On or about January 18, 2007, as instructed, Plaintiff called Chester to receive further instructions. Chester responded that Plaintiff would in fact have to work at the bathroom. Chester further stated that if she could hire more school aides then Plaintiff's situation might change, but that at the present time, because there was a freeze on hiring, that Plaintiff's job would be to "work by the bathroom." Plaintiff *again* replied that her disability would prohibit her from working by the bathroom, and requested a reasonable accommodation.

45. On or around January 18, 2007, there were *at minimum* 12 aide positions to which Plaintiff could have been assigned at Fort Hamilton, not even including Plaintiff's previous position of eight (8) years as the Social Studies aide, which also would have accommodated Plaintiff's disability. If Chester had offered Plaintiff any one of those other positions, or simply offered Plaintiff a return her previous position, then Plaintiff would have been able to safely resume her duties at Fort Hamilton, and to adequately complete the essential functions of her job. Moreover, reasonably accommodating Plaintiff with any of those other Aide positions would not have placed an undue burden on any of the Defendants. Lastly, contrary to custom practice at Fort Hamilton, aides more junior than Plaintiff were assigned to work in office positions, when they typically would have been required to work a non-office position such as the one that Chester and Kozlowski were attempting to assign to Plaintiff.

46. Additionally, during that January 18, 2007 conversation between Plaintiff and Chester, Chester informed Plaintiff that Kozlowski had falsely alleged that he had seen Plaintiff smoking a cigarette outside the school on January 16, 2007. Plaintiff responded that Kozlowski was lying.

47. After this conversation with Chester, Plaintiff had a conversation with Abood. At that time, Abood told Plaintiff that Chester had been telling people at Fort Hamilton that Chester had personally observed Plaintiff smoking a cigarette at a retirement party. Plaintiff responded that Chester was lying because Plaintiff did not smoke cigarettes, and then pointed out that Chester had not stated that to Plaintiff during their previous conversation, but instead told Plaintiff that it had been Kozlowski who had observed Plaintiff smoking a cigarette.

48. Later on that same date, January 16, 2007, in further discriminating against Plaintiff due to her disability, Chester submitted a written request to Edward Seto ("Seto"), the Local Instructional Superintendant, to request that Plaintiff undergo a medical examination due to her "excessive absences" relating to her disability.

49. On February 6, 2007, pursuant to Seto's directive in response to Chester's letter, Clayton Newman ("Newman"), the Director of the Medical, Leaves & Benefits Office for DOE's Division of Human Resources, sent a letter to Plaintiff ordering Plaintiff to submit to a medical examination on February 28, 2007.

50. Plaintiff followed Newman's orders, and submitted to the medical examination, although the examination did not occur until March 2, 2007. At said examination, Dr. Elaine Meyer ("Dr. Meyer"), the Assistant Medical Director for the DOE's Medical,

Leaves, & Benefits Office, examined Plaintiff for all of five (5) minutes, and did not conduct any tests on Plaintiff's lungs.

51. In a report dated that same date, March 2, 2007, Dr. Meyer pronounced Plaintiff "not fit" for duty.

52. Based on Dr. Meyer's examination, in a letter dated March 21, 2007, Chester informed Plaintiff that based on the "not fit" for duty determination, that Plaintiff's only options were: (1) to take Leave without pay for one (1) year for restoration of health; (2) resignation; or (3) retirement.

53. Thus, with Chester's March 21, 2007 letter, the Defendants informed Plaintiff that they were refusing to allow Plaintiff to return to work based on her disability, and were also refusing to make a reasonable accommodation to assist Plaintiff with that disability. As stated above, there were numerous options available to the Defendants should they have wanted to reasonably accommodate Plaintiff, none of which would have resulted in an undue burden on the Defendants.

54. As such, in a final act of illegal discrimination and in retaliation against Plaintiff for opposing Defendants' illegal discriminatory practices, the Defendants collectively constructively discharged Plaintiff from her position of employment.

55. On February 26, 2007, due to the aforementioned acts of discrimination engaged in by Defendants, Plaintiff filed a charge of discrimination with the EEOC.

56. On July 1, 2009, the EEOC, after investigating Plaintiff's claim, issued a formal, written determination, in which it concluded that Defendants "subjected [Plaintiff] to disability discrimination in violation of the ADA."

FIRST CLAIM AGAINST DEFENDANTS CITY AND DOE

Violation of Americans with Disabilities Act,
42 U.S.C. § 12101, Disability Discrimination and Retaliaiton

57. Plaintiff repeats, reiterates and re-alleges each and every allegation set forth above with the same force and effect as if more fully set forth herein.

58. Plaintiff is an employee and a qualified person with a disability within the three-pronged definition of Title I of the ADA.

59. Plaintiff suffers from a severe, life-threatening lung disease that limits her ability to breathe, which is to say that it limits her ability to perform major life functions.

60. Plaintiff, despite her disability, with reasonable accommodation, is capable of performing the essential functions of her job.

61. Plaintiff requested from Defendants a reasonable accommodation and Defendants failed to reasonably accommodate Plaintiff.

62. Reasonably accommodating Plaintiff would not have been an undue hardship on Defendants.

63. Defendants City and DOE are employers within the meaning of the ADA.

64. Defendants City and DOE, as thoroughly detailed above, via the adverse employment actions of constructively terminating Plaintiff's employment and subjecting Plaintiff to a hostile work environment, discriminated against Plaintiff on the basis of a disability that substantially affects one or more of Plaintiff's major life activities.

65. Defendant City and the DOE retaliated against Plaintiff because of Plaintiff having exercised her rights in opposing discrimination under the ADA.

SECOND CLAIM AGAINST ALL DEFENDANTS

Disability Discrimination,
Failure to Accommodate, and Retaliation in Violation of the NYSHRL §296

66. Plaintiff repeats, reiterates and re-alleges each and every allegation set forth above with the same force and effect as if more fully set forth herein.
67. Plaintiff is an employee and a person with a qualified disability within the meaning of the NYSHRL.
68. Plaintiff suffers from a severe, life-threatening lung disease that limits her ability to breathe, which is to say that it limits her ability to perform major life functions.
69. Plaintiff, despite her disability, with reasonable accommodation, is capable of performing the essential functions of her job.
70. Defendants City and DOE are employers within the meaning of the NYSHRL.
71. Defendants City and DOE discriminated against Plaintiff as described above based upon Plaintiff's disability that substantially affects one or more major life activities, and thereby violated Plaintiff's employment rights under the NYSHRL.
72. Plaintiff requested from Defendants a reasonable accommodation and Defendants failed to reasonably accommodate Plaintiff, even though accommodating Plaintiff would not have been an undue hardship on Defendants.
73. Defendants Chester and Kozlowski aided and abetted said discrimination in violation of the NYSHRL.
74. Defendant City and DOE retaliated against Plaintiff because of Plaintiff having exercised her rights under the NYSHRL opposing Defendants' illegal discriminatory practices.

75. Defendants Chester and Kozlowski aided and abetted said retaliation in violation of the NYSHRL.

THIRD CLAIM AGAINST ALL DEFENDANTS

Disability Discrimination,
Failure to Accommodate, and Retaliation in Violation of the NYCHRL §8-106

76. Plaintiff repeats, reiterates and re-alleges each and every allegation set forth above with the same force and effect as if more fully set forth herein.
77. Plaintiff is an employee and a person with a qualified disability within the meaning of the NYCHRL.
78. Plaintiff suffers from a severe, life-threatening lung disease that limits her ability to breathe, which is to say that it limits her ability to perform major life functions.
79. Plaintiff, despite her disability, with reasonable accommodation, is capable of performing the essential functions of her job.
80. Defendants City and DOE are employers within the meaning of the NYCHRL.
81. Defendants City and DOE discriminated against Plaintiff as set forth above based upon Plaintiff's disability that substantially affects one or more major life activities, and thereby violated Plaintiff's employment rights under the NYCHRL.
82. Plaintiff requested from Defendants a reasonable accommodation and Defendants failed to reasonably accommodate Plaintiff, even though accommodating Plaintiff would not have been an undue hardship on Defendants.
83. Defendants Chester and Kozlowski aided and abetted said discrimination in violation of the NYCHRL.

84. Defendant City and DOE retaliated against Plaintiff because of Plaintiff having exercised her rights under the NYCHRL by opposing Defendants' illegal discriminatory practices.

85. Defendants Chester and Kozlowski aided and abetted said retaliation in violation of the NYCHRL.

DEMAND FOR A JURY TRIAL

Plaintiff demands a trial by jury of all issues and claims in this action.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, demands judgment against Defendants as follows:

1. Enter a judgment declaring that Defendants' patterns, practices and omissions, as described above, in retaliating against Plaintiff for her exercise of her constitutional rights violates the law;
2. Enter a judgment and award in favor of Plaintiff and against Defendants for reasonable monetary damages, including back pay (plus interest or an appropriate inflation factor and enhancement to offset adverse tax consequences associated with lump sum receipt of back pay), front pay, benefits and all other damages owed to Plaintiff in an amount proven at trial, resulting from Defendants' unlawful and discriminatory acts or omissions;
3. Enter a judgment and award in favor of Plaintiff for the compensatory, punitive, exemplary and liquidated damages available under all applicable Federal, State, and Local laws;
4. Enter a judgment and award in favor of the Plaintiff for costs, including, but not limited to, reasonable attorneys' fees, experts' fees, and other costs and expenses of this litigation;

5. Enter a judgment and award in favor of Plaintiff for pre-judgment and post-judgment interest;
6. Award such other and further legal and equitable relief as may be found appropriate and as this Court may deem just and proper; and
7. Retain jurisdiction over this action until such time as it is satisfied that Defendants have remedied the practices complained of and is determined to be in full compliance with the law.

Dated: Carle Place, New York
March 15, 2010

Respectfully Submitted,

By: ________/s/______________________
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